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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 548

G. P. HODGES AND R. H. HODGES,

Appellants,

v.

THE BUCKEYE CELLULOSE CORPORATION,

Appellee.

On Appeal from the District Court of Appeal, First District, State of Florida

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, THE BUCKEYE CELLULOSE CORPORATION

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Appellee, the Buckeye Cellulose Corporation respectfully moves pursuant to Rule 16 of this Court, to dismiss the instant appeal for the following reasons:

1. No final judgment has been rendered in the proceeding from which the appeal has been taken;

2. The decision appealed from was not rendered by the highest court of the state of Florida in which review could have been had;

3. No decision in favor of the validity of the state statute in question has been rendered by the state courts as required by 28 USC § 1257 (2), the statute under which appellants rely for jurisdiction in this Court;

4. The appeal does not present a substantial federal question and the federal question sought to be reviewed was not passed on by the state courts.

In the alternative, appellee moves to affirm the decision below on the ground that it is manifest that the questions raised by this appeal are so unsubstantial as not to need further argument.

If the appeal is treated as a petition for a writ of certiorari, the writ should be denied for the reasons set out in paragraphs 1 and 2 above and also because the court below did not decide a substantial federal question and there are no special or important reasons warranting exercise of this Court's certiorari jurisdiction.

OPINION BELOW

The opinion and orders below are set forth in the appendix to appellants' brief.

STATUTES AND RULES INVOLVED

28 USC §§ 1257 and 2103, together with the applicable sections of the Florida Constitution, Rules of Civil Procedure, and Appellate Rules are set out in appellee's appendix. Chapter 24952, Laws of Florida, 1947, which appears in appellants' appendix, is also reproduced in appellee's appendix.

PRELIMINARY STATEMENT

This is an attempted appeal from the decision of an intermediate appellate court of the State of Florida which affirmed (by dismissal of the appeal) an order of the trial court striking one count of appellants' amended complaint. The order of the trial court was made following a motion to strike by appellee pursuant to Rule 1.11(f) of the

Florida Rules of Civil Procedure which corresponds to Rule 12(f) of the Federal Rules of Civil Procedure. (Appendix at Page 17 *)

The allegations which were stricken related to the claimed unconstitutionality of Chapter 24952, Laws of Florida, 1947. This statute declares Taylor County, Florida, to be an industrial area and permits municipalities and industrial residents to discharge waste into the Fenholloway River subject to specified conditions. (Appendix at Pages 15-16) The statute does not purport to exempt any person from civil liability arising out of discharge of waste. A second count of appellants' complaint sought damages and equitable relief claiming that appellee's acts constituted a nuisance. Appellee has answered the latter count and the case is at issue. All of the facts alleged in the first count are incorporated in the nuisance count and the statute has not been interposed as a defense to Count 2.

Following the order of the trial court striking Count 1, appellants attempted to appeal directly to the Supreme Court of Florida. Since the trial court had not passed upon the constitutionality of Chapter 24952, there was no statutory or constitutional basis for such an appeal and the Supreme Court of Florida transferred the appeal to the District Court of Appeal for the First District of Florida. Following a full hearing the district court affirmed the ruling of the trial court holding that appellants lacked standing to contest the constitutionality of Chapter 24952 because the statute did not affect their personal or property rights. To the contrary, the court held that appellants' rights were fully enforceable in the pending private civil action. The allegations stricken by the trial court were characterized by the district court of appeal as ". . . immaterial, if not also impertinent." (174 So. 2d at page 568)

* Appendix References are to Appellee's Appendix throughout.

The Florida Constitution and the Florida Appellate Rules (Appendix at pages 13-14, 16-17) provide for appellate review by the state supreme court of certain classes of decisions of the district courts of appeal, including decisions certified by the district courts. Appellants failed to seek certification and no attempt was made to obtain appellate review in the state supreme court.

Appellants claims for damages and equitable relief embodied in Count 2 of the complaint are at issue and awaiting trial.

QUESTIONS PRESENTED

1. Was the decision of the First District Court of Appeal dismissing appellants' interlocutory appeal a "Final Judgment" within the scope of 28 USC § 1257?

2. Was the First District Court of Appeal the "Highest Court" of the State of Florida in which review could be had, as required by 28 USC § 1257?

3. Did the decision of the First District Court of Appeal uphold the validity of a state statute over the contention that it was repugnant to the Constitution of the United States, as required by 28 USC § 1257(2)?

4. Does the appeal present any substantial federal or constitutional question decided adversely to appellants by the state courts.

5. If the appeal is treated as a petition for a writ of certiorari, does the decision below involve any special or important federal question?

ARGUMENT

1. The Decision of the First District Court of Appeal Dismissing Appellants' Interlocutory Appeal Is Not a Final Judgment.

The principle that this Court will not entertain interlocutory appeals is one which has prevailed since the

earliest days of this Court. Justice Frankfurter characterized this principle as:

> ". . . especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern" *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67 (1948).

This Court has held that a reviewable state court decision must at least provide an effective determination of the litigation and not merely a determination of interlocutory or intermediate steps. *Market Street Ry. Co.* v. *Commission*, 324 U.S. 548 (1945).

The purported appeal in the instant case does not even come close to meeting this test of finality. Despite the plethora of appellate proceedings, the case has not even come to trial on the merits. The same civil action from which the present appeal arises is awaiting trial in Taylor County, Florida, on the claims that appellee has maintained a private nuisance. The very first sentence of the opinion of the district court of appeal is conclusive as to the lack of finality:

> "The plaintiffs . . . have taken this *interlocutory appeal* from an order entered by the Circuit Court for Taylor County granting the defendant's motion to strike . . ." (174 So.2d at page 566, Emphasis added)

Thus the decision from which appellants seek to appeal is nothing more than an interlocutory determination that one branch of appellants' complaint does not present a justicable issue. This Court surely does not sit to review interlocutory motions addressed to the pleadings and, notwithstanding appellants prestigious contentions, the present appeal does not rise above that level.

2. The Decision of the District Court of Appeal, from Which Appellants Seek to Appeal, Is Not a Judgment Rendered by the Highest Court in Which Review Might Be Had.

Both 28 USC §§ 1257 and 2103 require that the state court decision appealed from be a decision of the "highest court" of the state in which review is possible. The present appeal is sought to be taken from the District Court of Appeal, First District of Florida, an intermediate appellate court. Although appellants made a misguided effort to appeal directly from the trial court to the Supreme Court of Florida, no attempt was made to obtain review in the Supreme Court of Florida from the decision of the court of appeal. This alone is fatal to appellants present appeal.

Art. V, Section 4 of the Florida Constitution and Rule 2.1 a. (5) (b) of the Florida Appellate Rules (Appendix at pages 13-14, 16-17) provide for review of decisions of the district courts of appeal, *inter alia*, by certiorari where the decision is certified by a district court of appeal to be of great public interest. No certification has ever been requested by appellants and no effort has been made to obtain review by the Florida Supreme Court. This Court has recently held that where state procedure provides for appeal to the highest court by certification from an intermediate appellate court, the failure of the appellant to seek certification requires dismissal of an appeal to this Court. *Gotthilf* v. *Sills*, 375 U.S. 79 (1963). The procedure followed by the appellant in *Gotthilf* and the appellate structure involved in that case bear a marked resemblance to the circumstances of the present appeal and we submit that *Gotthilf* is clearly controlling.

Finally, if the district court of appeal upheld the constitutionality of Chapter 24952 against a claim of repugnance

to the Federal Constitution as appellants seem to contend, appellants could appeal *as a matter of right* to the Florida Supreme Court. The availability of this review is set out in both Art. V, Sec. 4 of the Florida Constitution and Appellate Rule 2.1 a. (5) (a). (Appendix at pages 13-14, 16) The availability of further review in constitutional cases was reaffirmed by the Florida Supreme Court in answers to questions certified by this Court in *Dresner* v. *City of Tallahassee*, 375 U.S. 136 (1963). See 164 So. 2d 208, at page 212 wherein the Florida Supreme Court stated:

> "Such decision (of the district court of appeal) is reviewable by the Florida Supreme Court if it initially construes a controlling provision of the state or federal constitution or initially passes upon the validity of a state or federal statute or treaty. To this extent complete exhaustion of Florida's appellate procedure would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked."

Upon receipt of this answer, this Court dismissed the writ of certiorari as improvidently granted. 378 U.S. 539 (1964).

Thus appellants cannot avoid the dilemma that if the decision of the district court of appeal meets the test of 28 USC § 1257 (2) (which it surely does not), appellants have failed to take an appeal to the state supreme court which is available as a matter of right, but if the decision is not reviewable as a matter of right by the state supreme court, then it is not a decision which meets the test of 28 USC § 1257 (2). In any event, the failure to seek review in the state supreme court either as a matter of right or by certification requires dismissal of this appeal.

3. The Decision Appealed from Does Not Uphold the Validity of Chapter 29452 Against a Claim of Repugnance to the Constitution, Laws or Treaties of the United States.

Appellants place their reliance upon 28 USC § 1257 (2) for appellate jurisdiction in this Court. This reliance is badly misplaced because this statute has no application unless the court below determines that a state statute is not repugnant to the Constitution, Laws or Treaties of the United States. The decision of the district court of appeal does not meet this test by any stretch of the imagination. Quite to the contrary, the district court of appeal, like the circuit court, found that appellants lacked standing to challenge the constitutionality of Chapter 24952 because appellants could obtain complete relief for any invasion of their property rights by adjudication of their private nuisance claim which was not affected by Chapter 24952. Obviously there is a world of difference between a decision which holds that a statute is constitutional and a decision which holds that the question of constitutionality is not properly before the Court. The action of the Florida Supreme Court in declining to entertain a direct appeal from the circuit court and instead transferring the appeal to the district court of appeal was taken for the same reason—the Constitution and Appellate Rules of Florida limit the right of direct review in the state supreme court to decisions which pass directly upon the validity of state statutes. (Appendix at pages 13, 16)

This Court has held repeatedly that in order to invoke its appellate jurisdiction from a judgment of a state court, the record must show affirmatively that a federal question was not only raised by the appellant ". . . but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case." *Chouteau* v. *Gibson*, 111 U.S. 200 (1883). In the instant case appellants made

sundry allegations involving both the Federal and State Constitutions but clearly the court below did not rule on any constitutional question for the fundamental reason that it was unnecessary and inappropriate to do so. Thus by the express language of 28 USC § 1257 (2) and Rule 16(b), appellate jurisdiction is lacking and the appeal should be dismissed.

4. The State Courts Did Not Decide a Federal Question of Substance and There Are No Special or Important Reasons for Granting a Writ of Certiorari.

Appellee recognizes that a faulty appeal from a state court may be treated as a petition for a writ of ceriorari under 28 USC § 2103. Of course, the lack of finality of judgment and appellants' failure to seek review in the Supreme Court of Florida is just as conclusive in the case of certiorari as on direct appeal. However, passing these grounds, the present appeal has none of the characteristics of "special and important reasons" which this Court requires. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955).

The so-called constitutional questions raised by appellants merely reflect appellants' disagreement with the Florida Legislature as to the wisdom of Chapter 24952. Appellants apparently believe that every citizen has a right to obtain an adjudication of the constitutionality of any state legislation regardless of the absence of any showing of necessity or any circumstances showing that the legislation affects them differently than the public generally. This, of course, is the very antithesis of the rule followed by this Court and the courts of Florida that there is no *per se* power to review and annul acts of the legislature. Direct injury, not academic interest, is the criterion. *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923). The fact that the Florida Legislature has chosen to limit the application of other police power legislation so as to

exclude a particular area certainly does not present a judicial issue. Appellants have no vested right to have the police power exercised uniformly throughout the state. This is purely and simply a question for the legislature.

Chapter 24952 takes nothing whatsoever from the legally protectible rights owned by appellants. If there has been any wrongful taking then appellee is responsible—not the statute. Full redress is available to appellants in the case now pending and Chapter 24952 is in no way involved. As the Court below observed:

> "This chapter contains, however, no provision specifically exempting such person, firm or corporation from liability if such discharge or deposit causes damage to the person or property of any person" 174 So. 2d at page 567.

Thus the validity of Chapter 24952 is purely academic insofar as appellants are concerned and the claims in appellants brief that their property has been taken without due process of law are utter nonsense. Due process is available to appellants in the case now awaiting trial in Taylor County whenever they turn their attention to the merits of the case rather than wasting the time and effort of all concerned on specious and illusory constitutional arguments.

5. In the Alternative, the Questions Raised on This Appeal Are So Unsubstantial that Further Argument Is Unnecessary and the Decision of the Court Below Should Be Affirmed.

In the foregoing argument appellee has shown the manifestly unsubstantial nature of the questions sought to be raised by this appeal. Appellants' lack of standing to challenge the constitutionality of Chapter 24952 on Federal grounds and the absence of any necessity for a

constitutional adjudication are clear on the face of the record and further argument would be superfluous. Consequently appellee submits that if the appeal is not dismissed, the decision of the court below should be affirmed.

CONCLUSION

Appellee submits that the present appeal has the dubious distinction of lacking every material requisite for appellate jurisdiction. That is, it does not involve a final order; it does not arise from the highest state court; it does not involve a state statute held valid over objections based on federal grounds and it does not involve a substantial federal question. Consequently the appeal should be dismissed summarily or the decision below affirmed.

Respectfully submitted

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APPENDIX

FEDERAL AND STATE STATUTES, CONSTITUTIONAL PROVISIONS AND RULES

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

§ 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted

on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs. As amended Sept. 19, 1962, Pub.L. 87-669, § 1, 76 Stat. 556.

CONSTITUTION OF THE STATE OF FLORIDA, ARTICLE V SECTION 4 (2)

SECTION 4. **Supreme Court.—**

(2) JURISDICTION. Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of con-

stitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

CHAPTER 24952 No. 1338
(House Bill No. 242.)

AN ACT Relating to Taylor County, Florida, Determining and Declaring said County to be a Manufacturing and Industrial Area, Determining and Declaring that it is and will be in the Interest of the Public, the United States of America, the State of Florida, and Taylor County, Florida, to Grant to Municipal Corporations, and to Persons, Firms and Corporations Operating Manufac-

turing or Industrial Plants in Said County the Right and Power to Discharge and Deposit Sewage, Industrial and Chemical Wastes and Effluents, or any of them, into the Waters of the Fenholloway River and the Waters of the Gulf of Mexico into which said River flows, and Granting such Rights and Powers.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. It is hereby determined and declared that Taylor County, Florida, has become and now is a manufacturing industrial area, and that the manufacturing industry is the principal industry of the people of said county; and it is further determined and declared that it is and will be in the interest and to the benefit of the public, the United States of America, the State of Florida as a whole, as well as for Taylor County, Florida, and the people thereof, that the manufacturing industry within said county be enlarged, increased and expanded, and the growth and development of the municipal corporations within said county be stimulated and encouraged by the grant of the rights and powers hereinafter specified.

Section 2. That every municipal corporation situated in Taylor County, Florida, and every person, firm or corporation operating any manufacturing or industrial plant in Taylor County, Florida, shall have and is hereby granted the right and is hereby empowered to discharge and deposit sewage, industrial and chemical wastes and effluents, or any of them, into the waters of the Fenholloway River and the waters of the Gulf of Mexico into which said River flows, provided, however, that the navigation of such waters shall not thereby be impeded or obstructed.

Section 3. This Act shall not be construed as limiting or restricting any rights, powers or privileges now exist-

ing to discharge or deposit sewage, wastes or effluents into the waters of Taylor County, Florida.

Section 4. That all laws and parts of laws in conflict herewith are hereby repealed.

Section 5. This Act shall take effect upon becoming a law.

BECAME A LAW WITHOUT THE GOVERNOR'S APPROVAL.

FILED IN OFFICE SECRETARY OF STATE May 5, 1947.

FLORIDA APPELLATE RULES, RULE 2.1 a.(5)

(5) **Jurisdiction of the Supreme Court**

(a) Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or Federal Constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or Federal Constitu-

tion. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law.

The Supreme Court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to trial courts when questions are involved upon which a direct appeal to the Supreme Court is allowed as a matter of right.

FLORIDA RULES OF CIVIL PROCEDURE, Rule 1.11 (f)

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

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An Ohio Corporation,
Appellee.

APPELLANTS' OPPOSING BRIEF AS TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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An Ohio Corporation,
Appellee.

APPELLANTS' OPPOSING BRIEF AS TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellants, G. P. HODGES and R. H. HODGES, files this, their Opposing Brief opposing Appellee's Motion to Dismiss or Affirm, in pursuant to Rule 16(3) of this Court, as to the questions presented in Appellee's Motion, to wit:

1. Was the decision of the First District Court of Appeal dismissing appellants' interlocutory appeal a "Final Judgment" within the scope of 28 USC Section 1257?

2. Was the First District Court of Appeal the "Highest Court" of the State of Florida in which review could be had as required by 28 USC Section 1257?

3. Did the decision of the First District Court of Appeal uphold the validity of a state statute over the contention that it was repugnant to the Constitution of the United States, as required by 28 USC Section 1257(2)?

4. Does the appeal present any substantial federal or constitutional question decided adversely to appellants by the state courts?

5. If the appeal is treated as a petition for a writ of certiorari, does the decision below involve any special or important federal question?

ARGUMENT

Appellee's questions 1 and 2 will be argued as one because the two are inseparable.

Appellants submit that the decision of the District Court of Appeal, which is the basis of this appeal, was a Final Judgment.

The Supreme Court of the State of Florida is the court of last resort in the State of Florida, but its jurisdiction as to appeals from district courts of appeals is limited, and set forth in Article V, Section 4(2) of the Constitution of the State of Florida, the applicable portion reads as follows:

> *"Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty,* or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law." (Emphasis supplied)

The powers of the Supreme Court to review decisions of the District Courts of Appeal are limited and prescribed by the Constitution. *Diamond Berk Insurance Agency v. Goldstein,* 100 So. 2d 420 (Fla. 1957); *Sinnamon v. Fowlkes,* 101 So. 2d 375 (Fla. 1958).

Rule 2.1(5)(b) of Florida Appellate Rules, contains practically the identical portion of the Constitution of the State of Florida, as quoted above.

Appellee cites *Dresner v. City of Tallahassee,* 375 U.S. 136 (1963) and 164 So. 2d 208, and on page 7 of its Brief quotes a portion of the case as decided by the Supreme Court of the State of Florida. Appellee apparently cites the case to stand for the proposition that the instant appeal is not final. If anything, the case of *Dresner v. City of Tallahassee,* as decided by the Supreme Court of the State of Florida, would bolster Appellants position that the instant case that was decided by the District Court of Appeal, First District, was, and is final, because it does not come within the purview of any of the requirements of the Supreme Court's Appellate Jurisdiction under the Constitution or Appellate Rules, as can readily be seen by a cursory observation of the above quoted portion of the Constitution and of the quoted portion at page 7 of Appellee's Brief, and a careful reading of the case bears out that since July 1, 1957 the Appellate Jurisdiction of the Supreme Court of the State of Florida has been limited as to the matters and issues that come within the constitutional portion quoted above. The case of *Dresner v. City of Tallahassee* has little similarity to the facts involved in the instant appeal. Besides the fact that that case was decided on its merits in the Municipal Court of Tallahassee, Appellate proceedings subsequent to that time was a comedy of errors in that the Defendant attempted to appeal directly from the Municipal Court to the Supreme Court of the State of Florida, which appeal was transferred to the Circuit Court, Second Judicial Circuit, where it was affirmed, when the

Defendant filed a Petition for Certiorari addressed to the Florida District Court of Appeal, First District, which was not timely filed, and then by that time the Defendant was frustrated to the extent that an attempt was made to by-pass the District Court of Appeal and the Supreme Court of Florida and appeal directly to the Supreme Court of the United States, when it is obvious that the Petition for Certiorari to the District Court of Appeal would have been appropriate had it been timely filed.

Therefore, it can readily be seen that the jurisdiction of the Supreme Court of the State of Florida was cut off by the District Court of Appeal refusing to initially pass upon the validity of Chapter 24952, Laws of Florida 1947. This, of course, has created a most unusual situation, in that the result of the decision of the District Court of Appeal was that they did indirectly what they could not have done directly, which was pointed out in Appellants' Jurisdictional Statement in the paragraph commencing at the bottom of page 8. Nor is there any provision in the above quoted portion of the Constitution of the State of Florida, or Appellate Rules, or any other means, whereby Appellants could have petitioned the Supreme Court of the State of Florida by certiorari to review the said decision of the said District Court of Appeal.

Appellants submit that the decision of the District Court of Appeal is final. It must be kept in mind that the trial court entered an order striking Count I and paragraphs 18 and 19 of Count I incorporated by reference into Count II of Appellants' Amended Complaint (see copy of said order at page A-8 of Appellants' Jurisdic-

tional Statement), which said stricken portions pertained to all of the allegations contesting the validity of said Special Act 24952. When portions of pleadings, especially whole counts, are stricken, such is, Appellants submit, by its very nature final, and when the District Court of Appeal entered its decision affirming the trial court's ruling, it certainly became final at that time, subject to this appeal, because it immediately became the law of the case.

Appellants are aware of no provision whereby the issue could ever be litigated again, the outcome of this appeal excepted, and submit that there is none. Therefore, if it could not be litigated again, it would necessarily follow that it is final.

The Appellee discussed, at considerable length, and suggested that Appellants could have sought review by certiorari under Article V, Section 4, of the Constitution of the State of Florida, and Rule 2.1 a.(5) (a) of Florida Appellate Rules under the theory that the decision could have been certified by a District Court of Appeal to be of great public interest, and in support thereof cited *Gotthilf v. Sills,* 375 U.S. 79 (1963). Appellants submit that the Gotthilf case could have no bearing whatsoever on this case. In the first place, the Gotthilf case arose in the State of New York, under Section 589 of the New York Civil Practice Act, which provided that appeals from final orders could only be taken to the Court of Appeals by leave of the Appellate Division upon certified questions. The Supreme Court of the State of Florida and District Courts of Appeal of the State of Florida, where applicable, have repeatedly held that certified questions from a lower court will only be entertained in

cases where it does not appear that the question is without controlling precedent, and that the lower court does not have power to adjudicate the questions, and when the issue can be decided on no other theory (see *Dade County v. Philbrick,* 162 So. 2d 266 (1964); *Jaworski v. The City of Opa-Locka,* 149 So. 2d 33 transferred to 149 So. 2d 566). It is obvious that there was no issue of not being any controlling precedent, because certainly the District Court of Appeal could have ruled the said Special Act 24952 either constitutional or unconstitutional, but it refused to do so. Moreover, since the District Court of Appeal refused to rule as to whether the said Special Act was constitutional or unconstitutional, it would seem to be a foregone conclusion that it would not certify the issue to the Supreme Court of the State of Florida as a question of great public interest.

Since Appellee has raised the question, in these late appellate proceedings, that the Appellants could have petitioned for a writ of certiorari as to the decision of the District Court of Appeal because it was of *great public interest,* Appellants submit and invite this Court's attention to the fact that the issues covered by the stricken portions of Appellants' Amended Complaint was, and is, of great public interest, in that it pertained to pollution of not only the Fenholloway River, but underground percolating water. The Congress of the United States, the President of the United States and the news media of this country have recognized and sounded warnings as to the acute seriousness of the water pollution problem facing this country today; that water pollution is a luxury that this country cannot afford and that time is running out. Appellants, therefore, suggest

that this Court take judicial notice of this critical problem, and consider it to be one of great public interest.

In question 3 of Appellee's Motion to Dismiss or Affirm, it was argued that said Special Act, Chapter 24952, was not repugnant to the Constitution of the United States, unless the District Court of Appeal would have determined it to not be so. In this respect, Appellants submit that this goes to the very heart of this issue, and Appellants feel that there is one question that could, and does, encompass all of the issues involved in this appeal, which said question Appellants submit and invite the Court's attention, to wit:

> MAY A STATE COURT PRECLUDE REVIEW BY THE SUPREME COURT OF THE UNITED STATES OF THE CONSTITUTIONALITY OF A STATE STATUTE BY REFUSING TO PASS ON THE CONSTITUTIONALITY OF SUCH STATUTE EVEN THOUGH APPELLANTS ARE OBVIOUSLY INJURED BY SUCH PATENTLY UNCONSTITUTIONAL ACT?

Because if a state court can avoid review of a federal constitutional question merely by stating that there is none, then there would be an intolerable paradox — that an erroneous decision of the State Court would be superior to the Federal Constitution, which is supposed to protect all the citizens of the country.

Appellee's 4th question argues that the questions raised by Appellants were no Special or Important Reasons to the extent that such would warrant the granting of a Writ of Certiorari, and it even suggested that the

validity of Chapter 24952 is merely academic as far as Appellants are concerned. Appellants submit that there is nothing academic when one has his property (which has been the family Homestead for almost a half century) wrested from him by another with the help of special interest legislation. If special interest legislation can be enacted, enabling one to wrest property from another contrary to the language of the Supreme Court of the United States in the case of *Regan v. Farmers Loan, etc. Co.,* (Texas 1894), 14 S. Ct. 1047, 154 U.S. 390, 38 L. Ed. 1014, in the first column at page 1024 of 38 L. Ed. wherein the Court stated:

> "In every constitution is the guarantee against the taking of private property for public purposes without just compensation. *The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another or of the public."* (Emphasis supplied);

then it would appear that the constitutional guarantee would have little meaning, and Appellants submit hat this is especially true and noteworthy where the general statutory laws of the State of Florida prohibits and makes it a crime to do the things the said Special Act permits. In fact, Appellants submit that instead of the validity of Chapter 24952 being merely academic, it is about as flagrant a piece of special interest legislation as one could envision.

In opposition to Appellee's question 5, wherein it was argued that the questions raised by Appellants were too unsubstantial to warrant further argument. Appel-

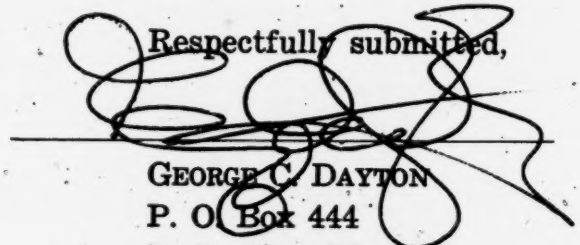
lants alleged in the portions of their Amended Complaint that was stricken that their real property, which had been the family Homestead since the year 1926 had been reduced to a practically worthless state by acts of the Appellee operating with immunity and impunity from risks of penalty from statutory general laws of the State of Florida. The Constitutional guarantees pertaining to due process of law and the equal protection of the laws are the very basic fundamental things which undergird the constitutional principles under which we live. This is not just an ordinary case of someone doing a thing under special legislation, but this is an instance where Appellee is doing acts under special legislation which is contrary to and diametrically opposed to the general statutory laws of the State of Florida, which said general statutory laws, Appellants submit that they have a vested right to claim all the benefits under as all of the other citizens of the other 66 counties of the State of Florida. When allegations are made, as Appellants did in the portions of their Amended Complaint which were stricken, that their constitutional rights had been invaded, then they submit that such questions are never unsubstantial.

CONCLUSION

This Court has not in the past, and especially in recent years, failed to take jurisdiction of matters wherein ones civil rights were infringed upon by state legislation. Appellants submit that ones right to own and hold property, without the same being wrested from them under special legislation, is just as basic under the Constitution of the United States and the Constitution of the State of Florida, as ones civil rights, and, therefore, request that this Court take jurisdiction of this appeal and of the subject matter involved, either by Appeal or by Certiorari, and that it enter such orders as may be necessary, including that of ordering the District Court of Appeal, First District, State of Florida, to rule directly as to whether Chapter 24952, Laws of Florida, 1947, is constitutional or unconstitutional.

DATED at Dade City, Florida, October 18th, 1965.

Respectfully submitted,



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